

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Docket No.

76-1300

To be argued by
Jerome F. O'Neill

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

v.

DELIA AGUILAR SAN JUAN

Appellee

Appellant

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES

GEORGE W.F. COOK
United States Attorney

JEROME F. O'NEILL
JOHN R. HUGHES, JR.
Assistant U.S. Attorneys
District of Vermont

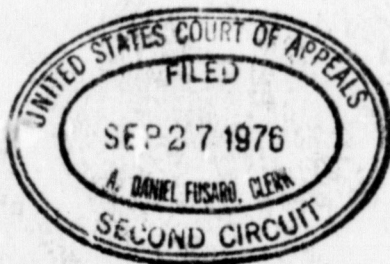


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IN THE
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UNITED STATES OF AMERICA

Appellee

v.

DELIA AGUILAR SAN JUAN

Appellant

BRIEF FOR THE UNITED STATES

Preliminary Statement

Delia Aguilar San Juan appeals from a judgment of conviction entered on June 21, 1976 after a three day trial before the Honorable Albert W. Coffrin, United States District Judge, and a jury.

An information, bearing Criminal No. 75-46 and filed October 23, 1975* charged Delia Aguilar San Juan with transporting and causing to be transported into the District of

* Defendant was originally charged in a single count indictment handed up by the grand jury on June 26, 1975 in virtually identical language, with the exception that the indictment did not indicate that the failure to file the report was willfull. The original indictment was dismissed with the Government's consent at the time of the defendant's arraignment on the superseding information. (TRa-3-4)

Vermont from Canada monetary instruments in the approximate amount of \$77,500.00 and with willfully failing to file a report as required by 31 U.S.C. § 1101(b) and in violation of 31 U.S.C. § 1058 and § 1101(a) and 31 C.F.R. § 103.23(a) and § 103.25(b).

Defendant moved pre-trial to dismiss the indictment on the grounds that it did not state facts sufficient to constitute an offense against the United States (R. Doc.* 3), that § 1101(a) and § 1101(b) were unconstitutional in that they violated the defendant's fifth amendment right against self-incrimination and right to due process; fourth amendment right against unreasonable searches and seizures; first and fourth amendment rights to privacy; and sixth amendment right to be informed of the nature and cause of the accusations against her

* R. Doc. refers to record document. Other references parallel those used in defendant's Brief to the maximum extent feasible as follows: DA-Defendant's Appendix; TRa-Transcript dated October 29, 1975; TRb-Transcript dated January 19, 1976; TRc-Transcript dated March 9-11, 1976; TRd-Transcript dated June 21, 1976. Other references used by the Government are: GX-Government Exhibit; GA-Government Appendix; DX-Defendant's Exhibit; DB-Defendant's Brief.

(R. Doc. 4); to suppress and return other monetary instruments and other documents (R. Doc. 5) and for return of \$5,000.00 (R. Doc. 6).

The motion to dismiss for failure to state facts sufficient to constitute an offense against the United States, together with the motion for return of the \$5,000, were withdrawn by defendant's counsel prior to hearing on those motions. (TRa-4)* All of the remaining motions were determined adversely to the defendant by written decision of the District Court on December 29, 1975, which decision is reported at 405 F. Supp. 681 (D. Vt. 1975).

Defendant thereafter moved to dismiss the information pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure on the ground that the information was facially invalid. (R. Doc. 31) The motion was denied by the District Court. (TRb-9)

The trial of Delia Aguilar San Juan began on March 9, 1976 and on March 11, 1976 the jury returned a verdict of guilty. (GA 4)

* See also, letter from Samuel Gruber to David A. Reed dated October 25, 1975, reproduced at GA 23.

Defendant moved on April 9, 1976 for a judgment of acquittal notwithstanding the verdict (R. Doc. 39, 40). The motion was denied at the time of sentencing on June 21, 1976, following which defendant was sentenced to the custody of the Attorney General or his authorized representative for a term of imprisonment of one year, all of which was suspended with the exception of thirty days. Defendant was thereafter placed on probation for a period of three years with sentence stayed pending appeal. (DA 108)

STATEMENT OF ISSUES

- I
WHETHER 31 U.S.C. §§ 1101(a), 1101(b) AND THE
REGULATIONS ISSUED BY THE SECRETARY OF THE
TREASURY PURSUANT TO THE STATUTE, 31 C.F.R.
§§ 103.23(a), 103.25(b) VIOLATE THE FIFTH
AMENDMENT SELF INCRIMINATION AND DUE PROCESS
CLAUSES AND THE FIRST AMENDMENT PROVISIONS
WITH RESPECT TO FREEDOM OF ASSOCIATION, RIGHT
OF PRIVACY, OF BELIEF AND ASSOCIATION

- II
WHETHER THE DISTRICT COURT CORRECTLY DENIED
THE MOTION TO DISMISS THE INDICTMENT AS
FACIALLY INVALID AND PROPERLY DENIED
DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL
AT THE CLOSE OF THE GOVERNMENT'S CASE

- III
WHETHER THE CURRENCY AND OTHER EVIDENCE USED
BY THE GOVERNMENT WERE VALIDLY SEIZED

- IV
WHETHER LETTERS FOUND IN THE DEFENDANT'S
POSSESSION WERE ADMISSIBLE

- V
WHETHER THE DISTRICT COURT'S CHARGE WITH
RESPECT TO WILLFULLNESS WAS CORRECT

STATEMENT OF FACTS

Delia Aguilar San Juan entered the United States from Canada at Highgate Springs, Vermont, by bus from Montreal, Canada, on March 30, 1975, Easter Sunday, shortly after 9:00 A.M. (TRC-101-03) U.S. Customs Inspector Robert M. Johnson, an officer with fourteen years experience, conducted the dual Immigration/Customs inspection of the bus. (TRC-101-02) Inspector Johnson questioned Mrs. San Juan and satisfied himself that she was a United States citizen and asked her if she had "acquired items in Canada she was bringing back with her."* (TRC-104-05, 151) Mrs. San Juan indicated she was bringing back a couple of small boxes for her children, but nothing else. (TRC-105-06; 151) No specific question was asked by Inspector Johnson as to whether Mrs. San Juan had any cash with her, nor did Mrs. San Juan bring up the subject. (TRC-138, 151-52)

* Inspector Johnson did not use the Customs form 6059- "Customs Declaration," which is designed for use at air and sea ports. See DX 1, GA 22. References as to when oral and written declaration are required are found at 19 U.S.C. § 1485 and 19 C.F.R. §§ 148.11 to 148.19.

Inspector Johnson inspected Mrs. San Juan's luggage on the bus initially and observed what appeared to be candy in the bag as well as a couple of brown packages near the bottom. (TRC-107-08) While he was inspecting the bag, Mrs. San Juan was moving the things in the bag around with her hands in a somewhat "helter skelter" manner. (TRC-107-08) Mrs. San Juan indicated that the two brown packages were books and that she was with the University of Connecticut at Storrs, Connecticut. (TRC-108) Inspector Johnson assisted Mrs. San Juan in putting the bag back on the luggage rack above her seat and at this point in time would have terminated his inspection of Mrs. San Juan had he not decided mentally to do a secondary inspection. (TRC-108) Inspector Johnson did not in any manner indicate to Mrs. San Juan that he intended to conduct a secondary inspection nor that he was going to return to her. (TRC-108-09) Inspector Johnson was suspicious of Mrs. San Juan because of the small brown envelopes or packages in the bottom of the bag and wished to see what they contained, specifically to see if there was contraband of any kind. (TRa-48) Inspector Johnson did not have a specific suspicion as to what was in the packages, but suspected there was contraband after his examination of the bag. (TRa-50)

Johnson continued his inspection of the remaining passengers on the bus and thereafter returned to Mrs. San Juan, whom he asked to come inside for further examination of her baggage. (TRC-109) Mrs. San Juan inquired as to what if anything was wrong both on the bus and while they were proceeding inside, became quite nervous as they proceeded inside, and again asked if anything was wrong and what the reason was for looking at her bag. (TRC-109-10) Inspector Joan McClatchey joined Inspector Johnson in the inspection at the counter inside the Border Inspection Station and was present when Inspector Johnson asked Mrs. San Juan to again open her bag. (TRC-111) In examining the bag Johnson found, among other things, the two brown packages which has previously been in the bottom of the bag. At this point Mrs. San Juan became very upset and nervous and seemed to be on the verge of tears. (TRC-112, 147)

Inspector McClatchey examined one of the brown packages (GX 2), noted it was open, and observed several envelopes inside, two of which were opened. (TRC-112-13, 170) She removed the two open envelopes from the larger envelope and from the open envelopes removed two letters. (TRC-113, 170-71) She called these to the attention of Inspector Johnson, who viewed one of them and indicated this was a

matter which should be referred to the Port Director. (TRC-115) Mrs. San Juan at this point then took the other package which had been removed from the luggage, ripped it open, looked in and remarked "Oh, my God, no." (TRC-114, 173) Inspectors Johnson and McClatchey looked inside the package and observed what appeared to be a large sum of money. (TR -115, 174) The package containing the money, which had "Bryan" marked on the outside (GX 1, GA 6), and the second envelope (GX 2) containing the seven sealed envelopes and the two unsealed envelopes with letters inside (GX 4, 12, 3, 13; GA 7-10) were all brought to the Port Director. (TRC-119) Mrs. San Juan had become quite nervous and almost hysterical prior to opening the package, and was very, very upset when Inspector Johnson returned to the lobby area where the examination of the luggage had been taking place. (TRC-173, 115) The Inspectors took Mrs. San Juan into a back office since she was so upset and nervous and they wanted to give her some privacy while the examination continued. (TRC-116, 174) Inspector McClatchey stayed with Mrs. San Juan until the Customs agents arrived, and over the period of time, approximately two hours, tried to comfort and assist her. (TRC-177, 178) Inspector McClatchey conducted a patdown search of Mrs. San Juan

and found Government Exhibits 5, 6, 7, 8 and 9* in her handbag. (TRc-175-76; GA 11, 12, 13-14, 15, 16)

Inspector Johnson, who had determined that there were 775 \$100 bills, for a total of \$77,500.00, in one of the packages, returned shortly thereafter and read Mrs. San Juan her Miranda rights. (TRc-118-19) Shortly after reading the Miranda rights Inspector Johnson brought Mrs. San Juan a form 4790, the "Report of International Transportation Currency or Monetary Instruments." (GX 10; GA 17-18; TRc-119, 176) Inspector Johnson put the form down in front of Mrs. San Juan together with a pen and told her that the form was required to be filed with U.S. Customs for the Internal Revenue Service by all persons crossing the international border into the United States and carrying over \$5,000 in currency or monetary instruments. (TRc-120, 176) Inspector Johnson asked Mrs. San Juan if she wanted to make it out and told her if she needed help he would be glad to help her make out the form. Mrs. San Juan (TRc-120) indicated she did not care to make out the form. (TRc-120, 176, 217) The form stayed near Mrs. San Juan until after the Customs agents had arrived, approximately two hours later, and was eventually removed from her presence at approximately

* GX 9 (GA 16) was offered by the Government, but excluded by the Court on the ground it would be more prejudicial than probative. (TRc-250-51)

1:00 P.M. (TRC-259)

Inspector McClatchey stayed with Mrs. San Juan in an attempt to assist her prior to the arrival of the Customs agents and while they were there. (TRC-175, 185, 204) Mrs. San Juan indicated initially in the course of conversation with Inspector McClatchey, that she did not know the origin of the money. (TRC-181) She subsequently indicated to Inspector McClatchey that she got the money in Montreal from two men and a woman and that she was going to bring the money to her home in Connecticut where at some future time it would be picked up by persons unknown to her. (TRC-181) Inspector McClatchey showed Mrs. San Juan a piece of paper which had been taken from her purse (GX 5, GA 11) with the name Mary Jane Clark written on it and asked if this was one of the people who would pick it up, which Mrs. San Juan indicated was correct. (TRC-182) Mrs. San Juan indicated the money was in transit through the United States to the Philippines where it would be used to support friends and intellectuals who were repressed by the Marcos regime. (TRC-182) She indicated that these people were unable to find jobs, unable to support themselves, and had to go underground because they would have been tortured or imprisoned. (TRC-182) She further expressed concern for her personal safety and was afraid she would be tortured or otherwise

physically harmed during the course of questioning, which Inspector McClatchey of course indicated would not take place. (TRC-182-83) She further expressed a concern for her husband who was a resident alien and the fear that he might be sent back to the Philippines. (TRC-183)

U.S. Customs Special Agents Richard F. Mercier and Michael Consavage arrived at the Port of Highgate Springs at approximately 11:30-11:45 A.M. to investigate the importation of the currency. (TRC-225-26) Special Agent Mercier advised Mrs. San Juan of her constitutional rights pursuant to Miranda and Mrs. San Juan indicated she understood what her rights were and was willing to talk,* but that she would not like to answer some questions if that was alright. (TRC-229-30) Mrs. San Juan indicated to the Special Agents that she was born in the Philippines and was a naturalized U.S. citizen with family still residing in the Philippines. (TRC-230-31) She was willing to answer very limited questions with respect to the events which had taken place earlier that day. (TRC-231) Mrs. San Juan indicated she had gone to Canada from her residence in

* Mrs. San Juan executed a statement of rights and waiver form. (GX 11)

Storrs, Connecticut, via Hartford, Connecticut, by bus. (TRC-254) Mrs. San Juan indicated she had stayed in Montreal, as per a hotel receipt found in her possession by Inspector McClatchey. (GX 7; TRC-254; GA 12) Although Mrs. San Juan initially indicated she had stayed in Montreal on March 28, she later changed this to Ottawa upon being shown a second hotel receipt in the name of what appears to be Rivera. (GX 6; GA 13; TRC-255) Mrs. San Juan expressed to Agent Mercier a fear for her own personal safety and the possibility of being tortured and indicated that the discovery of the money could possibly hurt her family in the Philippines. (TRC-256)*

Special Agent Mercier presented Mrs. San Juan with a form 4790, but Mrs. San Juan indicated she wanted to consult with her husband prior to making out the form. (TRC-257) Special Agent Mercier indicated that she was the individual who had custody of the currency at the time of entry into the United States and it would be for her to complete and not her husband. (TRC-257) Approximately one hour after having entered the room Special Agent Mercier, after consulting with the office of the United States Attorney,

* Although Agent Mercier asked Mrs. San Juan other questions with respect to the money, she declined to answer those questions and of course this fact was not brought out before the jury. (TRC-75, 185-90)

advised Mrs. San Juan that she had been afforded ample opportunity to complete the form 4790 and that a determination had been made that the currency was going to be seized and retained for investigation by U.S. Customs. (TRC-257-58) Mrs. San Juan was allowed at that point to call her husband and arrangements were made for her to take the next bus from the inspection station to Hartford, Connecticut. (TRC-158, 179, 258)

ARGUMENT

POINT I(a) 31 U.S.C. §1101(a), §1101(b) AND ITS REGULATIONS
31 C.F.R. §103.23(a) AND §103.25(b), ARE CON-
SISTENT ON THEIR FACE AND AS APPLIED WITH THE
FIFTH AMENDMENT SELF-INCRIMINATION CLAUSE

Although both the Supreme Court in California Bankers Assn. v. Schultz, 416 U.S. 21 (1974) and the District Court here, United States v. San Juan, 405 F. Supp. 686, 693 (D. Vt. 1975), noted that the purposes of the Bank Secrecy Act of 1970 were essentially prosecutorial in nature, this interpretation of Congressional intent does not mean that the reporting requirements per se violate the self-incrimination clause of the fifth amendment. A compelling public interest was met through the passage of this statute since, as noted in both the Senate and House Reports on the bill which became law, secret foreign bank accounts have been used significantly by tax evaders, stock swindlers and other white collar criminals. See S. Rep. No. 91-1139 (91st Cong., 2d Sess. Aug. 24, 1970) 3-4; H. Rep. No. 91-975 (91st Cong., 2d Sess. March 28, 1970) 10. See California Bankers Assn. v. Schultz, 416 U.S. at 28-29. Notwithstanding this declaration of Congressional intent, the reporting* requirement of the statutes and its regulations are not "directed

* The Government stresses the reporting requirements are not so directed, since, as discussed infra, the couriers are not normally those engaging in the tax evasion and white collar crimes themselves.

at a highly selective group inherently suspect of criminal activities," but rather the reporting requirements concern "an essentially non-criminal and regulatory area of inquiry" and not "an area permeated with criminal statutes."

Albertson v. SACB, 382 U.S. 70, 79 (1965). The factual situations presented in cases which have found the above criteria to be inapposite are totally distinguishable from the situation presented here. In Leary v. United States, 395 U.S. 6, 18 (1969), Haynes v. United States, 390 U.S. 85, 98-99 (1968), Grosso v. United States, 390 U.S. 62, 64 (1968), and Marchetti v. United States, 390 U.S. 39, 56-57 (1968) compliance with the reporting requirement in each instance was the equivalent of turning one's self in for prosecution under either related federal or state statutes. In each instance the reporting requirements were aimed at those who almost invariably were violating federal and state statutes by engaging in the conduct which had to be reported. This is hardly the case here, as noted by the District Court:

The requirements, though not effecting "the public at large", apply to all persons traveling across the borders with more than \$5,000 exempting only specified banks and trust companies and their agents, securities brokers and dealers, common carriers, and travelers check issuers. 31 C.F.R. §103.23(c) It is safe to assume that most international travelers, even those carrying substantial sums of money, are without criminal disposition. To them the recording requirements pose no danger of present or future incrimination. The defendant conceded in her Brief that, "there is not even a rational basis. . .to conclude that the mere possession of \$5,000 is related to criminal activity." In addition, the disclosures actually called for in the challenged reports are comparatively "neutral on their face," as was the case in Sullivan with tax returns.

United States v. San Juan, 405 F. Supp. at 682. The conclusion of the District Court is consistent with the Congressional purpose behind the statute:

The committee wants to emphasize in the strongest possible terms that the purpose of this chapter is to require reports on currency exports and imports and not to limit or impede the free flow of currency in international commerce. No one would be prevented from taking currency out of or into the country in whatever amounts he desired as long as the reporting requirements were observed. The objective of the chapter is to aid law enforcement authorities to prosecute U.S. criminals.

S. Rep. No. 91-1139, supra, at 7. The Congressional intent not to restrict commerce and the District Court's finding with respect to the flow of money are both contrary to what the legislation was intended to accomplish in Leary, Haynes, Grosso, and Marchetti, where the obvious intent of the Congress was to enable the state and federal government to prosecute more easily those who complied with the reporting requirements and thereby put them out of business.

Under the currency exporting and importing reporting requirements, those who will most likely run afoul of the statute and regulations are not those who actually may tend to incriminate themselves, but more likely couriers, as apparently was the case with Mrs. San Juan, who simply do not wish to divulge their activities for fear of prosecution of those whom they are acting on behalf of. See H. Rep. No. 91-975, supra at 13; S. Rep. No. 91-1139, supra at 6. Since "the Fifth Amendment privilege is a personal privilege,"* the privilege is available with respect to the reporting requirements, if it is available at all, only to those who will actually be incriminated themselves. Couch v.

* If Mrs. San Juan properly had filled out form 4790 she would have been required only to fill in limited biographical and trip information already available to the Government under the circumstances, as well as the amount and type of currency and the name, address and business activity, occupation or profession of the person on whose behalf she was acting, if she was not acting on her own. See form 4790, GX 10, GA 17-18. There is no reason to believe that this information normally would incriminate someone such as Mrs. San Juan, but it might well provide useful information as to illegal activity by those for whom they were acting.

United States, 409 U.S. 322, 328 (1973) (emphasis by the Court). Neither Marchetti nor Grosso invalidated the statutory pronouncements at issue in each case, but rather made a valid fifth amendment claim a bar to prosecution for failure to comply with them. Grosso v. United States, 390 U.S. 62, 69-79 n.7 (1968); Marchetti v. United States, 390 U.S. 39, 60-61 (1968). The defendant herein made no fifth amendment claim at the border, but rather seemed to wish not to incriminate others by indicating from whom the funds had been received and to whom they were being transferred. Such conclusion is evidenced by Mrs. San Juan's refusal to even put her name on the form and list the amount of currency she was carrying.* Under the circumstances of this case defendant is

* At no time at the border did Mrs. San Juan indicate that disclosure of the information required on the form would tend to incriminate her. See In Re Citroen, 267 F.2d 915, cert. denied, 361 U.S. 826 (1959). Further, at no time during the proceedings herein has the defendant by affidavit or in any other manner made known directly to the Court that she is entitled to the claim of the fifth amendment under the facts here. Rather, the Government submits that she is attempting to use the fifth amendment vicariously as a protection for others.

at best attempting to assert a belated and vicarious fifth amendment claim to shield others from possible prosecution for illegal activities. It thus is clear upon a reading of the statute and its purpose that the reporting requirements on their face and as applied here are valid and totally distinguishable from cases where the Supreme Court has invalidated reporting requirements.

Even if the statute and regulations as compared to other invalidated reporting requirements would fall under the fifth amendment they are viable here due to their international orientation. The District Court, in deciding that the balancing competing interests favored the Government herein, relied in part upon the factor brought out in Schultz that the recording requirements involved "transactions which take place across national boundaries."* United States v. San Juan, 405 F. Supp. at 694, quoting California Bankers Assn. v. Schultz, 416 U.S. at 62.

* Although the defendant disparages this approach, (DB 11-13) no attempt is made to distinguish the language in Schultz relied upon by the District Court.

It is clear that the power delegated to Congress "over commerce with foreign Nations" contemplates an even broader exercise of authority than the power to regulate interstate commerce, since it extends to prohibitions against foreign financial transactions altogether. Board of Trustees of the University of Illinois v. United States, 289 U.S. 48, 57 (1933); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 434 (1932); Gibbons v. Odgen, 9 Wheat. 1, 192-93 (1824).

Again in this international area, long practice provides that persons entering and leaving the United States may be required to identify the items which they are importing or exporting; and, even if such identification would tend to incriminate them, their only legal alternative is to leave the items behind. See generally, United States v. Hill, 430 F.2d 129, 132 (5th Cir. 1970); United States v. Dalton, 286 Fed. 756 (W.D.Wash. 1923). As stated by the Supreme Court in Carroll v. United States, 267 U.S. 132, 154 (1925):

Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.

The report required to be filed here substantially is similar to customs declarations which do not contravene the self-incrimination privileges of the person required to make such reports.

It is clear that the international aspects of this statute were in the Supreme Court's mind when it considered this statute in Schultz:

The reports of foreign financial transactions required by the regulations must contain information as to a relatively limited group of financial transactions in foreign commerce, and are reasonably related to the statutory purpose of assisting in the enforcement of the laws of the United States.

Of primary importance, in addition, is the fact that the information required by the foreign reporting requirement pertains only to commercial transactions which take place across national boundaries.

California Bankers Assn. v. Schultz, 416 U.S. at 62.

Each of the above basis is sufficient in and of itself to sustain the statute and regulations against defendant's claim that they violate the fifth amendment self-incrimination clause.*

* As a third basis to support the validity of the statute and regulations, the Government submits that, contrary to the conclusion of the District Court in this respect, the statute and regulations involved herein meet the three-pronged requirements of Shapiro v. United States, 335 U.S. 1 (1948). See Grosso v. United States, 390 U.S. 62, 67-68 (1968). In addition to being reports as innocuous as those required to be filed in United States v. Sullivan, 274 U.S. 256 (1927), the required records exception of Shapiro is met here. First, although the foreign transaction reporting requirements of the statute are primarily aimed at criminal prosecution, the transactions required to be reported here possess nowhere near the criminal characteristics which were present in Marchetti, Grosso and Haynes.

Secondly, as is evidenced by United States v. Sullivan, supra, and Boyd v. United States, 116 U.S. 616 (1886) there is a governmental practice of requiring reports similar to those required here, and of course anyone who engages in such activity must necessarily keep records for personal and business purposes. Third, the important foreign commerce and tax purposes of requiring the reports necessarily gives them a public or official character.

POINT I(b)

DEFENDANT HAS NOT TIMELY RAISED A
DUE PROCESS CLAIM WITH RESPECT TO THE
STATUTE, AND THE STATUTE IS NOT A
VIOLATION OF FIFTH AMENDMENT DUE PROCESS
AS BEING UNDULY VAGUE

Defendant contends, in essence for the first time on appeal, that the statute and regulations involved herein are overly vague and do not provide fair notice. Defendant filed a document in the District Court entitled "Motion to Dismiss" which contained among its reasons for the dismissal the grounds that § 1101(a) and (b) were unconstitutional because they violated the defendant's fifth amendment "right to due process. . . ." (R. Doc. 4) Defendant filed a memorandum of points and authorities in support of the motion, but no mention was made of this claim.* It does appear that defendant's "Motion to Dismiss the Indictment" (R. Doc. 3) and accompanying memorandum of points and authorities refer in a very limited manner to the vagueness of the regulations which might be applicable. Even if this were sufficient to raise the question in the District Court, the "Motion to Dismiss the Indictment" was withdrawn by the defendant prior to hearing. (TRa-3, letter to David A. Reed from Samuel

* Local Rule 10 of the District of Vermont requires that a memorandum of points and authorities be filed in support of all motions.

Gruber dated October 25, 1975, GA 23*) The failure to raise the vagueness issue below deprived the Government of the opportunity to make a record and renders it an inappropriate subject for this appeal. United States v. Indiviglio, 352 F.2d 276 (2d Cir. 1965). cert. denied, 383 U.S. 907 (1966).

Even to the extent that the allegations with respect to vagueness are to be considered by this Court, it is clear that the regulations and the statute together indicate what the outside limits are of the information which could possibly be required on the form. Further, defendant had only to make inquiry of either the Internal Revenue Service or Bureau of Customs to ascertain the number of the form and obtain a copy.**

* It is clear that the District Court was not aware of any such issue having been raised since it is not mentioned in the Court's opinion nor on the record. Also, at the hearing on various defendant's motions on October 29, 1975 the Court inquired of Mr. Gruber whether there was anything else that should be taken up at that time, to which Mr. Gruber responded in the negative. (TRa-84)

** Defendant does not claim in her brief that the form was too vague. In addition, although Mrs. San Juan never indicated she did not understand the questions, unsolicited help was offered to assist her in making out the form. TRc-120, 190, 197, 208, 260-61.

Even if this Court reads the statute and regulations without reference to form 4790, the Government submits that they are clear on their face and adequately inform an individual of what is required in light of the facts at hand. United States v. National Dairy Products Corp., 372 U.S. 29 (1963).

Defendant attempts to suggest that the defendant is denied due process under these regulations by lack of notice of the existence of the reporting requirement. This runs contrary however to the evidence at trial which consisted, in part, of one Customs form used at air and sea ports on which the question is specifically asked (CF 6059-B; DX 1; GA 22) as well as GX 14 (GA 21) a thirteen by twenty inch red, white and blue Customs poster posted at Highgate Springs at the time of this event which indicated a report was required.*

These materials clearly gave the defendant sufficient notice to prevent any claim of a due process violation

* The District Court refused to admit as evidence, without indicating why, Government Exhibits 15 and 16 for identification, the cover and relevant parts of which are reproduced as GA 19 & 20. See TRC-167.

such as was alleged in Lambert v. California, 355 U.S. 225 (1958). Further, under the circumstances of this case it appears that the defendant was aware of the statute and its requirements and thus can hardly be held to be in the position of the innocent violator* in Lambert or United States v. Jones, 368 F.2d 795 (2d Cir. 1966).

* Mrs. San Juan specifically lied to Inspector Johnson concerning the contents of the two packages; two of the letters in her possession, Government Exhibits 3 & 13, (GA 7 & 10) both suggest a clandestine transportation of money and Mrs. San Juan has never claimed by affidavit or any other means that she was not aware of the requirements of the statute and regulations.

POINT I(c) 31 U.S.C. § 1101(a), § 1101(b) AND
31 C.F.R. § 103.23(a), § 103.25(b) DO
NOT VIOLATE THE FIRST AMENDMENT PROVISIONS
WITH RESPECT TO FREEDOM OF ASSOCIATION,
RIGHT OF PRIVACY, OR FREEDOM OF ASSOCIATION

Defendant contends that the statute and regulations at issue here infringe upon the first amendment guarantee of freedom of association. Defendant attempts to require that any Governmental document which questions might reveal the names of associates or associations be protected under the first amendment. Fortunately no decided case has reached to this extreme length. As noted by the District Court here, there is no indication that:

compulsory disclosure of the information sought from Mrs. San Juan in form 4790 would have a deterrent or detrimental effect upon her freedom to enter into associations or to participate in organizations.

United States v. San Juan, 405 F. Supp. at 695. The only question which could arguably provide the Government with the names of one's associates is question 27 which reads as follows: "Were you acting as an agent, attorney, or other capacity for anyone in this currency or monetary instrument activity?" Yes or no blocks are provided and if the yes block is checked the name and address of the person together with the person's business activity, occupation or profession are required. Such information obviously is intended to allow the Government to ascertain whether the person transporting the monetary instruments

is acting as a courier on behalf of others. It is hardly designed to ascertain one's associates within the meaning of Supreme Court decisions which have considered this area of the law.

There can be no legitimate suggestion that the Governmental inquiry present here in anyway parallels that present in NAACP v. Alabama, 357 U.S. 449 (1958) or any of its progeny. No request is made for membership lists of any type nor any related information which could in anyway fall within the first amendment protections.*

Buckley v. Valeo, 424 U.S. 1 (1976) is equally inapposite for reasons best described in the language of the Supreme Court's opinion:

The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of Government established by our Constitution. The First Amendment affords the broadest protection to such political expression. . . .

424 U.S. at 14. A cursory examination of the Supreme Court's decision makes it clear that the decision is

* Mrs. San Juan did not indicate at any point in time while she was at the border that she could not answer particular questions on the form due to potential abridgements of constitutional rights, but simply refused to even put her name on the form and list the amount of money she had with her.

premised upon the electoral rights of citizens and the freedoms of political association inherent in such rights. Further, the Act has the specific focus of "equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups." Nothing raised by the defendant herein nor even hypothetically required to be provided in response to questions on form 4790 can in anyway be construed to fall within the ambit of the protected area referred to in Buckley.

POINT II THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S
MOTION TO DISMISS THE INFORMATION PURSUANT TO RULE
12(b)(2) AND THE MOTION FOR JUDGMENT OF ACQUITTAL
AT THE CLOSE OF THE GOVERNMENT'S CASE

Defendant claims that the Government's information dated October 23, 1975 when read together with the Government's contention that the violation involved herein took place on the bus, failed to state a crime under the statute and regulations and therefore the information should have been dismissed. However, defendant has in effect conceded that the information is valid on its face by virtue of her claim that the information, when read with the Government's assertions of its theory, is invalid. Since the information tracked the language of the statute, the District Court properly denied the motion to dismiss the information and the only remaining question is whether the Court should have granted defendant's motion for judgment of acquittal at the close of the Government's case.

Defendant's assertion in this respect is premised upon the information together with declarations at various times by the Government that the failure to file the report took place on the bus. The difficulty with this position is that notwithstanding various statements made by the Government the facts speak for themselves and the defendant could not have forced the Government to choose its legal theory by means of a bill of particulars. United States v. Fruehauf,

196 F. Supp. 198 (S.D.N.Y. 1961) (5 possible theories, any of which were sufficient for conviction). See United States v. Kelley, 254 F. Supp. 9 (S.D.N.Y. 1966); United States v. Schillaci, 166 F. Supp. 303, 307 (S.D.N.Y. 1958). Nevertheless, defendant attempts to take the assertions made by the Government of its theory and require the Court to make its determination on the basis of that rather than on the facts as proven.* Since the defendant could not require the Government to state what its theory was in a bill of particulars, she can no more do so by means of pointing out what the Government's statements were as to its theory. What was before the Court at the time of the motion for judgment of acquittal were the facts and on the basis of those it was the duty of the Court to determine whether a violation had been shown.

* Although defendant attempts in footnote #3 of her Brief to suggest that the District Court felt that the violation occurred inside, the Government submits that the decision of the District Court does not rely upon a theory of either a violation in the bus or a violation in the inspection station, but relies upon the overall facts.

The Government submits that a violation could have been found by the District Court to have been complete on the bus when the following had been shown: (1) a transportation into the United States of monetary instruments in excess of \$5,000; (2) a failure to file form 4790, report of the importation of monetary instruments; (3) knowledge and willfullness in failing to file the report. The Government agrees that there is no duty upon anyone to make an oral declaration,* but at the point in time when Mrs. San Juan was questioned by the Customs officer and did not present him with a form 4790, the violation was complete. The violation also could be found to be complete upon the discovery of the monetary instruments inside the border inspection station and, after having been given an opportunity to fill out the form, Mrs. San Juan willfully refusing to do so at that point.

The Government has never claimed that there was no violation inside the inspection station nor has the Government ever claimed that the failure to make an oral declaration is a violation of the statute. The violation took place when a written statement was not filed while Mrs. San Juan was at the border inspection station at Highgate Springs.*

* Although the defendant makes claims at various times about the fact that the form was taken away from Mrs. San Juan at about 1:00 P.M., 3 1/2 hours after she arrived, the Government submits that there is no duty to wait indefinitely to see if an individual wishes to make up her mind whether to comply with the law.

The District Court seemed to specifically understand the Government's position since it noted in denying the defendant's motion for judgment of acquittal that the defendant's failure to advise the Customs Inspector on the bus that she was carrying the currency was only evidence of intent not to file the required report. (TRc-307)

The District Court in its charge did not attempt to specify where within the factual presentation made to the jury the finder of fact could find a failure to file the written report. The language of the Court's charge however makes it unequivocally clear that the Court also understood there was no requirement to make an oral statement and so specifically charged the jury:

[T]here was testimony that when questioned on the bus by a Customs officer, the defendant failed to state or advise him that she was carrying a large amount of currency or monetary instruments as they are referred to in the statute. This testimony, if believed by you, standing alone does not constitute proof of the offense charged, as the statute and regulations do not require oral statements or declarations. The testimony may, therefore, be considered by you as bearing only upon the defendant's knowledge or intention in failing to file a written report of the currency as charged.

(TRC-358) This language indicated that the jury had to find the defendant failed to file a written report at some point in time while she was at Highgate Springs, Vermont on March 30, 1975, and not simply have failed to orally tell Inspector Johnson of the money. Given these circumstances it is clear that the required elements properly could have been found by the jury to have been met either on the bus or inside the Customs facility since either standing alone or when both read together are sufficient for a violation* and therefore the motion for judgment of acquittal was properly denied.

* Although the Government made various statements to the effect that its theory was that the violation took place on the bus, this clearly was not as argued in all parts by the Government at the close of the trial nor as charged by the Court. Defendant claims no prejudice for this, and it is difficult to see how she could do so since her counsel devoted a significant part of his closing argument to the proposition that she did not act willfully in refusing to fill out the form inside the border inspection station. (TRC-334-37)

POINT III THE CURRENCY AND OTHER EVIDENCE USED BY THE
GOVERNMENT WERE VALIDLY SEIZED

Defendant moved pre-trial for the suppression of the \$77,500 seized on March 30, 1975 and "all documents, letters, and other memorandum seized from the defendant at the same time. . . ." (R. Doc. 9)

The motion was denied by the District Court. United States v. San Juan, 405 F. Supp. at 696-97. Defendant's contention is premised upon the assertion that Inspector Johnson did not suspect there was contraband in the two brown packages contained in Mrs. San Juan's suitcase on the bus. (DB 34) Such an interpretation is belied by an overall view of the transcript of the suppression hearing. See TRa 48-49, 55-56.

When viewed in the context of what happened at Highgate Springs, including Mrs. San Juan's attempt to move the items in her bag around in a helter skelter manner during the primary inspection, it is clear that Inspector Johnson was suspicious of Mrs. San Juan. This alone is sufficient. United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), cert. denied, 393 U.S. 1121 (1969). The District Court specifically found as a factual matter that Inspector Johnson was a highly credible witness who

determined that the packages should be inspected for contraband or other dutiable goods and decided to conduct the inspection inside the Customs Station "in order to spare Mrs. San Juan the embarrassment of having her baggage examined further in the presence of other passengers on the bus." United States v. San Juan, 405 F. Supp. at 697. Further, Mrs. San Juan became extremely nervous prior to the beginning of the actual secondary inspection and if there had been any question prior to that time that something was amiss it clearly was brought home then. (TRC-107-08) Defendant's attempt to suggest that the considerate Customs Inspector's attempts to examine the packages inside were the result only of his own curiosity is both contrary to the findings of the District Court and a distortion of the facts.

Defendant further attempts to equate the decision to retain the money pending the arrival of Customs Agents as a "seizure" of the currency made prior to the time Mrs. San Juan actually violated the law. The Government submits that she had already violated the law at the time she was given the form and seizure would have been appropriate. Nevertheless, it is clear that the actual seizure did not take place until long after Mrs. San Juan had been given an opportunity to fill out the form and had declined to do so.

The currency clearly was subject to seizure pursuant to 31 U.S.C. § 1102 and 31 C.F.R. § 103.48. See 19 U.S.C. § 1485; 19 C.F.R. §§148.11, 148.18. The currency also could have been detained since Mrs. San Juan at that point in time had refused to even fill in parts of the form sufficient to make a declaration of the money. 19 U.S.C. § 1497, 1592, 1595a; 19 C.F.R. §§ 148.7, 148.18, 161.2(b), 162.21.

The seizure of the remaining evidence in the case followed from the secondary inspection and was evidence of the violation which had already taken place. The evidence therefore was seizable pursuant to border search authority* and as mere evidence. Warden v. Hayden, 387 U.S. 294 (1967).

* 19 U.S.C. § 1496, 1582; 19 C.F.R. §§ 162.3 to 162.7.

POINT IV THE DISTRICT COURT PROPERLY ADMITTED
GOVERNMENT EXHIBITS 3 AND 13, TWO LETTERS
FOUND IN THE DEFENDANT'S POSSESSION

The Government offered two opened letters* contained in defendant's luggage at the border and which the Government suggested in argument were addressed to the defendant.

The Government argued that the letters were Mrs. San Juan's since both were opened and provided specific instructions for the transportation of currency, which is what Mrs. San Juan was doing. Further, the references in the context of the letter made it clear that the individual in the letter, although addressed under the name "Bryan," was a female and in all likelihood that the person to whom they were addressed was a United States citizen. In addition, the letters provided that the individual picking up the money could use part of the money for expenses, and Mrs. San Juan had an itemized list of expenses with her. (GX 8, GA 15) Mrs. San Juan also possessed a hotel receipt from the Holiday Inn in Ottawa, the Canadian capital and where any foreign embassies would be located, under a fictitious name but the amount of the

* (GX 3, 13; GA 7, 10)

bill was contained on her itemized list of expenses. Both letters were of importance to the Government's proof of a willfull violation of the statute and regulations since they made reference to currency and having "made it safely last time." (GX 13, GA 10) There are some limited references within both Government Exhibits 3 and 13 to clandestine activities and coded words, but overall these documents were highly probative and of very little, if any, prejudice. This is precisely the area where the trial court judge's discretion is called for. See United States v. Ong, No. 76-1087 (2d Cir. Sept. 14, 1976)*

To cure any possible prejudice the Court gave a limiting instruction to the jury prior to the time the exhibits were read to the jury and during its charge. (TRC-271-72; TRC-360)

A further consideration however is that defendant should not now be able to complain of the contents of the letters since the defendant specifically requested the opportunity to excise certain language from the letters and never availed herself of that opportunity. The Court had

* The Court exercised its discretion to admit the letter but excluded another document found on Mrs. San Juan on the ground that it was more prejudicial than probative. TRC-250-51.

indicated that some effort should be made in that respect and the Government had indicated a willingness to discuss this subject, but defendant did not either agree to the removal of any material or bring any problems to the Court's attention. (TRC-251)

POINT V THE DISTRICT COURT'S CHARGE WITH RESPECT
TO WILLFULLNESS WAS CORRECT

The District Court charged the jury correctly with respect to knowledge and willfullness and included language with respect to deliberate disregard pursuant to United States v. Gentile, 530 F.2d 461, 469-70 (2d Cir. 1976). While it is true that the language with respect to deliberate disregard goes to knowledge as opposed to willfullness, it is clear in the context of the Court's charge that the Court intended to convey to the jury that defendant could not close her eyes to the facts before her and not act when she knew or had reason to know that her conduct was a violation of the law. Although the defendant objected to the lack of the use of the term "evil motive" in the Court's charge, defendant made no attempt to suggest that the language with respect to deliberate disregard should not be included, nor that it had been improperly phrased to the jury. Furthermore to read the term willfully to require a bad purpose would be to confuse the concept of intent with that of motive. United States v. Moylon, 417 F.2d 1002, 1004 (4th Cir. 1969), cert. denied, 397 U.S. 10 (1970).

Defendant's reliance on United States v. Murdock and United States v. Bishop is clearly misplaced. Murdock and Bishop strictly limit the meaning of willfully to the area of criminal tax statutes and evolved from the split in the circuits over the meaning of willfully in section 7206 of title 26, as opposed to section 7207 of that title.

CONCLUSION

The conviction of Delia Aguilar San Juan
should be affirmed.

Respectfully submitted,

GEORGE W.F. COOK
United States Attorney

JEROME F. O'NEILL
JOHN R. HUGHES, JR.
Assistant U.S. Attorneys

September 21, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

UNITED STATES OF AMERICA)

Appellee)

v.)

DELIA AGUILAR SAN JUAN)

Appellant)

Docket No. 76-1300

CERTIFICATE OF SERVICE

I, Jerome F. O'Neill, Assistant U.S. Attorney for the District of Vermont, do hereby certify that I caused the foregoing Government's BRIEF and APPENDIX to be served upon the Appellant by mailing 3 copies of the Brief and 2 copies of the Appendix upon her attorneys of record, Samuel Gruber, Esquire, GRUBER & TURKEL, 218 Bedford St., Stamford, CT. and James W. Murdoch, Esquire, WOOL & MURDOCH, 131 Main St., Burlington, VT. this 22nd day of September, 1976.


JEROME F. O'NEILL
Assistant U.S. Attorney